STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2003B127

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID TEIGEN,

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL FACILITY.

Respondent.

THIS MATTER came on for hearing on December 14, 15, and 16, 2004, before State Personnel Board Administrative Law Judge Mary S. McClatchey. Complainant appeared through counsel, William S. Finger, Esquire. Respondent appeared through Melanie Sedlak and John Lizza, Assistant Attorneys General.

MATTER APPEALED

Complainant David Teigen ("Teigen" or "Complainant") appeals the abolishment of his position and denial of retention rights. He requests reinstatement to his position as a Case Manager III as of the date of layoff and an award of attorney fees and costs.

For the reasons set for the below, Respondent's action is **rescinded**.

ISSUES

- 1. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law;
- 2. Whether Complainant is entitled to an award of attorney fees and costs.

APPLICABLE LAW

Layoff Statute

Section 24-50-124, C.R.S. ("the layoff statute") states:

"Reduction of employees. (1) When certified employees are separated from state service due to lack of work, lack of funds, or reorganization, they shall be separated or demoted

according to procedures established by rule. Such procedure shall require that consideration be given to performance evaluations of the employees and seniority within the total state service. Such employees shall have retention rights throughout the principal department in which they are employed. . . ."

State Personnel Board Rules Governing Layoff ("Layoff Rules")

Chapter 12 of the State Personnel Board Rules contains the following definitions:

R-12-17. Layoff. Process of involuntarily separating an employee due to abolishment of the position for lack of work, lack of funds, reorganization, or displacement by another employee exercising retention rights."

Chapter 7 of the State Personnel Board Rules governs layoffs. The Rules provide in pertinent part:

"LAYOFF PRINCIPLES

- R-7-7. The only reasons for layoff are lack of funds, lack of work, or reorganization. These rules apply to any reduction in force that results in the elimination of one or more positions regardless of the reason for the layoff. [Emphasis added]
- A. Reorganization means a change in the fundamental structure, positions, and/or functions accountable to one or more appointing authorities. The department shall post a business plan documenting the reorganization in a conspicuous place before issuing the first layoff notice. This plan must include an organizational chart, the reasons for the change, the anticipated benefits and results, and a general description of the expected changes and their effects on employee[s]...
- R-7-9. In making layoff and retention rights decisions, departments shall use time bands to determine seniority. Departments shall also develop a matrix calculation for ranking priorities within the time bands. . . .

Determining Priorities for Layoff and Retention Rights

- **R-7-14**. Time bands for each affected class are established for three-year periods based on seniority. The three-year period begins with the calendar year in which the layoff notice is given and extends backward, e.g. notice issued in 2002 creates the most junior time band of 2000 2002. Employees in the most junior time band must be displaced before employees in more senior time bands.
- R-7-15. For purposes of layoff, seniority is the calendar year in which continuous state serve began "

Transfer Statute and Director's Procedure

Section 24-50-112.5(5) **Appointments**. (a) . . . A qualified employee may transfer between positions in the same class or to a different class at the same pay grade.

Director's Procedure P-4-5. Transfer is an appointment of a qualified employee to a different position in the same class or with the same grade maximum.

4 CCR 801 (2003) [Emphasis added]

FINDINGS OF FACT

- 1. Complainant commenced employment with Respondent on April 1, 1988 as a Correctional Officer I.
- 2. On November 1, 1999, Complainant was promoted to Case Manager III ("CM III"), and on May 1, 2000, he was certified into that position, #31030, at Territorial Correctional Facility ("Territorial"), in Canon City, Colorado.
- 3. Prior to his promotion to CM III, Complainant was certified in the following positions: CM II, Correctional Officer III, Correctional Officer II, and CM I.
- 4. Complainant's 2003 performance evaluation rating was Commendable; he received Outstanding ratings in Accountability/Organizational Commitment and Job Knowledge. He is a dedicated fifteen-year DOC employee who values his career at that agency.
- 5. As the only CM III at Territorial, Complainant supervised nine other case managers, maintained an active caseload of inmates (conducted work interviews; prepared parole plans, community referrals, and performance assessments), and acted as facility liaison on several DOC committees.

Abolishment of Teigen's CM III Position

- 6. In fiscal year 2003, the Colorado legislature imposed significant reductions on state agencies' budgets. DOC was forced to implement a reduction in force ("RIF").
- 7. Director of Prisons Nolin Renfrow directed DOC wardens to first utilize voluntary retirement incentive programs and a hiring freeze to meet budget reductions. This was successful in drastically reducing the number of positions to be abolished.
- 8. Renfrow then directed the wardens of each prison to submit a RIF plan to DOC executive management and the DOC Human Resources office for consideration. To assure DOC met its core mission of safety and security, he exempted all Custody and Control positions from abolishment.
- 9. James E. Abbott was the Warden of Territorial at the time and was therefore required to

make recommendations on the elimination of positions. He had two CM III's under his supervision at the time, Teigen at Territorial, and Robert Walter, at Colorado Women's Correctional Facility (where Abbott also served as Warden). Walter was senior to Teigen in state service, so Warden Abbott recommended that Teigen's position be abolished. He directed Walter to perform the CM III duties at both prisons.

- 10. Once DOC managers received the wardens' recommendations for abolishment of positions, they failed: A) to establish time bands for each affected class, including the CM III class, and B) to displace employees in the most junior time band before employees in more senior time bands.
- 11. Laurie McGowan was a CM III at Canyon Minimum Centers ("CMC"). She was in the 1989 1991 time band.
- 12. Complainant was in the 1986 1988 time band. Therefore, he was in the more senior time band than McGowan.
- 13. Applying Board Rules R-7-9 and R-7-14, DOC was required to abolish McGowan's position before Complainant's.
- 14. On May 5, 2003, DOC Executive Director Joe Ortiz sent a letter to Complainant advising him that his position #31030 would be abolished effective June 30, 2003, due to a lack of funds. The letter stated in part, "This letter satisfies State Personnel Rules, which require at least a 45-day notice of the abolishment of your position. Effective, close of business on June 30, 2003, you will be laid off and your name will be placed on a/an CASE MANAGER III reemployment list for a maximum of one (1) year unless you are reemployed in a position in your current class before the one-year period expires."
- 15. Complainant timely notified DOC he wished to exercise retention rights.
- 16. Having worked at DOC since 1989, Complainant had strong suspicions he was the most senior CM III (other than Walter) and therefore should not have received a layoff notice. He and other CM III's got together, reviewed the layoff rules, and made a time band of their seniority in state service. They confirmed that in fact Teigen was the most senior CM III in state service. He therefore determined he should file an appeal of the layoff in order to preserve his legal rights to his CM III position.

Teigen's Appeal

- 17. On May 15, 2003, Complainant initiated this appeal. In his appeal form, he stated in part the following:
- "When Appellant [Teigen] inquired of Madline SaBell [DOC Human Resources Director] what my bumping options were, Appellant was told that they did not know but there were going to try and work it out prior to Appellant being laid off.

- Personnel Rule R-7-16 states, "The department director must establish a matrix for ranking employees within a time band. . . . "
- "To the best of Appellant's knowledge and belief, no such matrix was established or communicated to employees prior to the first layoff notice being issued . . . When Appellant inquired what would happen if the department failed to identify his bumping options before June 30, 2003, Madline SaBell replied that Appellant would be laid off and Appellant would be placed on a re-employment list.
- Respondent violated "the rights of Appellant to be offered his retention (bumping) rights prior to layoff."
- No business plan for a reorganization was posted, as mandated by Board Rule R-7-7.
- DOC "has manipulated reorganization of the department in order to provide preferential treatment to some employees, the effect of which is discrimination against Appellant."
- 18. Under "Relief Requested," Complainant asked that Respondent "be ordered to furnish Appellant with his bumping rights prior to being laid off in accordance with the provisions of the Colorado Code of Regulations;" and that DOC "be ordered to hold Appellant harmless and refrain from engaging in any retaliation against Appellant for having filed this appeal."

DOC's Three Offers of Retention Rights to Complainant

- 19. By letter dated June 6, 2003 from Madeline SaBell, Director of Office of Human Resources, Complainant received an offer of retention rights to two encumbered positions, a CM III position at Trinidad Correctional Facility (outside Complainant's 50 mile radius) and a CM II position at DOC Headquarters (inside Complainant's 50 mile radius).
- 20. After this letter was sent, one of the employees holding an encumbered position notified the HR office that he was a veteran. DOC therefore modified the retention rights offered to Complainant.
- 21. On June 16, 2003, SaBell sent Complainant a second letter, rescinding the retention rights offered on June 6, 2003, and offering Complainant retention rights to an encumbered Case Manager III position at Sterling Correctional Facility (outside Complainant's 50 mile radius) and a CM II position at DOC Headquarters in Colorado Springs (inside Complainant's 50 mile radius). These retention rights were also erroneous.
- 22. Complainant was shocked to receive these erroneous offers to positions in locations other than Canon City, because knew his seniority in relation to the other CM III's. He was in no position to move his family to Sterling or Colorado Springs.

- 23. Complainant informed staff in the DOC Human Resources Office that he and others had calculated the appropriate time bands for CM III's under the State Personnel Board Rules; he explained how he had done it, by simply following those rules. He was informed by HR staffers that he had better accept whatever is offered or he would be without any job on July 1.
- 24. On June 18, 2003, SaBell sent Complainant a third letter, rescinding the retention rights offered in the June 16, 2003 letter and offering Complainant retention rights to a specific position number which he determined belonged to Laurie McGowan, at CMC. He was very interested in this position, notwithstanding the fact he knew his position should not have been abolished in the first place.

Agreement to Exercise Retention Rights to McGowan's CM III Position

- 25. Complainant contacted McGowan. She informed Teigen that as the less senior CM III, she had anticipated being bumped by him. Therefore, she had already obtained approval to cross-certify her position to that of Correctional Officer IV ("CO IV") (in the Custody and Control class series), which had the exact same pay grade as CM III, but was in a different class series. This cross-certification enabled her to bump into a CO IV when she was bumped by Teigen.
- 26. Teigen and McGowan amicably agreed that it was the best solution to the situation for Teigen to exercise bumping rights to her position.
- 27. On June 18, 2003, Complainant accepted retention rights to McGowan's CM III position, offered in SaBell's June 18th letter.

Additional Funding for Custody and Control Line at DOC Leading to Reorganization

- 28. By late June 2003, DOC had been able to avoid significant layoffs through early retirement incentive programs and through a hiring freeze that left over 500 positions vacant. Those two efforts brought DOC to within 95% of its budget reduction goal imposed by the funding reduction.
- 29. During the period of mid- to late-June, DOC Director of Finance and Administration L.D. Hay was reviewing the long bill² and found a line item worth \$1.5 to \$2 million dollars. Its position in the long bill was such that it had been earmarked exclusively for the Custody and Control line and class series. This class, consisting of the correctional officer class series, is commonly referred to as the "blue shirts," because those employees must be in uniform on the job.

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¹ The letter listed McGowan's position number, but stated erroneously that the facility was Fremont Correctional Facility. Complainant asked Kim Nelson, of the DOC HR Office, to pull the position number and she indeed confirmed that the position was actually McGowan's, at CMC.

² The legislation that contained appropriations for DOC and other state agencies.

- 30. DOC was faced with a situation where it had to spend the money for positions that were not in the Custody and Control line, because none of those positions had been abolished.
- 31. DOC identified thirty jobs that were to be saved by transferring them into the Custody and Control class series. One of those positions was Complainant's CM III position.
- 32. DOC did not post a reorganization plan for this mass transfer of positions and functions.
- 33. On or about June 26, 2003, Assistant Director of Prisons Mary Smith met with Warden Abbott and perhaps others to inform him that five of his employees' positions at Territorial would be saved, one of which was Teigen's.
- 34. On June 27, 2003, James Abbott, Warden for CTCF, sent Smith a confirming memo in which he stated in part that he had received direction from her of the following:
 - funding was available "to stop the abolishment/retention process" on five specific positions [one of which was Complainant's];
 - that these staff "will remain at CTCF; however, the funding line and work unit for their positions will be changed to Custody Control";
 - "To achieve the change, the classification titles for the Case Manager III and Case Manager I will be changed to Custody Control Correctional Officer IV and Corrections Officer II, respectively;
 - "All staff were told that even though their official classification titles and work unit would be revised on the front page of their PDQ's, their present job duties, work assignment, hours, reporting and supervisory relationships would not change";
 - "These staff were instructed that they could still exercise retention rights they had previously been offered and accepted, should they choose to do so, however, they must inform me of their final decision by noon today";
 - "per yesterday's telephone conversation with Rick Thompkins, the authority for these actions is in State Personnel Rule 1-6;
 - "Our Facility Staff Liaison Kim Nelson verified with Dixie Reed [] that the Budget Office will move these staff into available vacant position numbers since their current position numbers will be abolished July 1, 2003." (Emphasis added).
- 35. Renfrow, Gene Atherton, Assistant Director of Prison Operations, and Rick Thompkins, the HR staffer in charge of retention rights, among others at DOC, were cc'ed on Abbott's June 27th memo.
- 36. Also on June 27, 2003, Rick Thompkins, the staffer at DOC's Human Resources office in charge of retention rights, orally offered Complainant the opportunity to retain his current position at CTCF by becoming a Correctional Officer (CO) IV and being paid out of the Custody/Control funding line.
- 37. On June 27, 2003, Complainant discussed this offer with Warden Abbott, who assured

Complainant that he could continue to perform his CM III duties and schedule as outlined in his current PDQ, if he accepted the offer of becoming a CO IV under the Custody/Control funding line.

- 38. CM III's have a class number of A1A3XX.
- 39. CO IV's have a class number of A1D6XX; they are in the Custody and Control class series and funding line. Complainant has never been cross-certified to the CO IV position, because of health concerns and because the position is not on his desired career track at DOC.
- 40. The CM III and CO IV positions are in separate classes, separate class series, and different funding lines. The two positions do, however, share the same pay grade (range of pay).
- 41. On June 27, Complainant wrote Thompkins a memo accepting the offer, confirming "the warden stated that I would stay in my current capacity with the department and maintain my current duties, assignments and schedule as a CM-III as outlined in my current PDQ and only the cover of the PDQ would indicate a CO-IV title."
- 42. On July 1, 2003, DOC Executive Director Joe Ortiz sent Complainant a letter indicating that based upon new available funding, "the abolishment of your job has been rescinded; therefore, there is no need for you to respond to the retention notice."

DOC Managerial Directive to Warden Abbott to Rescind Offer to Teigen to Function as CM III

- 43. Some time between June 27 and July 7, 2003, Warden Abbott was given a direct order by either Renfrow, Gene Atherton, Abbott's direct supervisor, or Smith, (all of whom are above Abbott in the chain of command), to prohibit Complainant from performing the CM III duties under any circumstances.
- 44. No one at DOC gave Warden Abbott a business reason for this decision. No witness for Respondent explained the basis for that decision at hearing.
- 45. Warden Abbott was frustrated with this turn of events and he immediately commenced ongoing, active negotiations with the HR office. Warden Abbott had several telephone conversations about being put in a position of having to break his word with Complainant. He was, however, unable to move DOC off its position.
- 46. On July 7, 2003, Warden Abbott met with Complainant to advise him that he could no longer serve in a Case Management III position.
- 47. From August 2003 forward, Complainant has not served as a Case Manager III at DOC.

DOC Denial of Retention Rights to Complainant

- 48. On July 7, 2003, Complainant sent Mr. Thompkins an e-mail informing him that Warden Abbott had informed Complainant that the offer for Complainant to stay in his current position and maintain his current duties could no longer be honored. Complainant also wrote, in bold type face, "I am writing you this E-mail to inform you that I will exercise my rights to Retention at CMC as a CM-III [the McGowan position]." (Emphasis in original)
- 49. On July 7, Thompkins responded by email, "Dave, We will exercise your retention rights." Thompkins never rescinded this statement to Complainant.
- 50. Respondent never allowed Complainant to exercise his retention rights to the CM III position at CMC held by Laurie McGowan.
- 51. On July 8, 2003, at 2:17 p.m., DOC HR Director Madline SaBell sent an email to Thompkins, Renfrow, all DOC wardens, Mary Smith, and Gene Atherton, stating,
 - "Rick and I were just discussing a new development in the layoff. Apparently, some employees whose positions were 'saved' from abolishment, do not wish to perform duties associated with custody and control. If their position is not being abolished, they have no retention rights. If they don't want to perform the new duties (which the warden has the authority to assign pursuant to R-1-6), they have the right to *grieve*; but, they don't have the *right* to displace anyone else." (Emphasis in original.)
- 52. On July 11, 2003, Director of Prisons Nolin Renfrow sent Complainant a letter stating,
 - "Recently you were notified by the Office of Human Resources that, due to available funding, your position will not be abolished. These funds, made available by the General Assembly, are intended to support functions associated with custody and control; therefore, your assignment shall be revised to directly support custody and control. In as much as your position is no longer abolished, retention rights, previously offered to you, are no longer appropriate. Your continued patience and cooperation is greatly appreciated."
- 53. On July 17, 2003, Warden Abbott told Complainant that he would not be in a Case Manager III position, that he must report in a blue uniform supporting Custody and Control, and that there were no vacant CO IV positions so Complainant might end up at another facility.

Complainant's New CO IV Position

54. Complainant was extremely upset about his situation. He knew that to function as a CO IV would be a potential problem for his health, due to the requirement of working different shifts. Complainant has diabetes; therefore, working different shifts would have

disrupted his sleep and eating patterns, which could have been detrimental to his condition.

55. On July 23, 2003, Complainant wrote a memorandum to Warden Abbott with alternate proposals for his position: either keep him in his current position or reassign him to a "Programs Captain" position.

- 56. Warden Abbott approved Complainant's request and reassigned him into the "Programs" area at Territorial. Complainant drafted a Position Description for a Program Supervisor position, classified as a CO IV (with the class number of a CO IV, and AID6XX), and Warden Abbott signed it in August 2003.
- 57. Warden Abbott allowed Complainant to continue to work the same regular shift and to work out of uniform.
- 58. Complainant commenced his duties as Programs Supervisor on August 1, 2003. He managed education community integration, culinary arts, recreation, the yard, the gym, the hobby shop, and the music program. He also was the volunteer coordinator for Territorial.
- 59. Warden Abbott created and signed an organizational chart for Territorial on July 1, 2004, showing Teigen's CM III position as having been "abolished." Several organizational charts contained this information.
- 60. Complainant's performance evaluation in the CO IV position for the period August 1, 2003 through April 1, 2004 noted, "His previous job was abolished with the budget shortfall and he was in limbo for quite awhile."
- 61. As of August 1, 2003, Complainant's CM III position had been abolished via layoff due to lack of funds and reorganization.

Manipulation of Layoff and Retention Rights Process

- 62. Warden Abbott learned in mid-2003 that two of his General Professional V's, upon whom he relied heavily in his positions as warden over two facilities, would soon be bumped. He called Nolin Renfrow, explained how critically they were needed, and requested that they remain where they were.
- 63. Renfrow intervened in the layoff process and the two GP V's were never bumped. The only way he could have accomplished this would have been to contact personnel in the HR department responsible for implementing the layoff and retention rights process and to direct them not to allow the bumping to occur.³

³ One can only speculate about the fate of the two senior GP V's slated to do the bumping, and other domino effects this action had.

64. Warden Abbott did not contact Renfrow to intervene regarding the directive from Renfrow's office (Headquarters) that Complainant could no longer serve as a CM III. The most plausible reason for this disparity in treatment is the fact that Complainant had filed an appeal of his layoff and Warden Abbott would have paid a political price for advocating so directly on his behalf.⁴

August 15, 2003 Memo by Renfrow to Wardens Targeting Employees who Filed Appeals

- 65. DOC Executive Director Ortiz held weekly executive management team meetings, where Renfrow, HR Director SaBell, Jeannine Miller⁵, and L.D. Hay were in attendance. During the period of July and August 2003, they discussed the issue of job offers for the employees negatively impacted by the RIF.
- 66. According to Renfrow, the executive team kept a list of all employees negatively impacted by the RIF at those meetings. At each meeting, they had discussions about to whom they could make job offers; for example, if a vacancy came open in a facility, whom they could move into that vacancy off the reemployment list.
- 67. According to HR Director SaBell, the consensus among the executive team was, "for those employees laid off with no retention rights who had filed appeals, DOC had no obligation as a department to bring them back. If they [were to receive a position at DOC] then it would seem to me we should use the AG's office to get a settlement. [Such employees, upon reinstatement] would have no reason to go forward with their case if they were made whole."
- 68. The executive team decided to prohibit the wardens from making any job offers, including "restoration" or "moving them back to a previous position," to any employee who had appealed his or her layoff, unless the employee dropped the appeal.
- 69. On August 15, 2003, Renfrow issued a direct order to all wardens at DOC via email. The subject was "job offers." The directive stated,

"Please be aware that one of the conditions of offering displaced staff a position in your facility is that they MUST drop their cases against us. Offering a person a position at the same pay and grade means their pay, tenure and status have not been adversely affected, therefore; (sic) they have no standing and allowing them to continue their appeals will just clog up the DPA with cases that have no merit. I will have Holly e-mail a list of staff that has filed appeals against the department."

70. Renfrow copied Gene Atherton and Mary Smith, Assistant Directors of Prison Operations, and his administrative assistant on the email. Curiously, he did not copy HR

⁴ Warden Abbott advocated quietly on Complainant's behalf by creating the new position for him.

⁵ Director of Parole and Community Services

Director SaBell, although she was among the executive management team whose consensus formed the basis for the directive.

- 71. On August 19, 2003, Renfrow's assistant did email a complete list of all employees who had filed appeals of their layoffs to all wardens, again copying Atherton and Smith. The subject of the email was, "Appeals-Layoff spreadsheet," and it contained the following categories: name of employee, facility, State Personnel Board case number, basis for appeal (such as "age, national origin, retaliation"), and ALJ decision.
- 72. Complainant's name appeared on the list.
- 73. Warden Abbott received the email and the attachment with Teigen's name on it.
- 74. While the memo does not define "displaced staff," Renfrow testified that the memo applied to job "restoration" and to situations where DOC was moving an employee "back to [a] previous position."
- 75. Renfrow considered the memo a mandatory set of instructions to the wardens. At hearing, Renfrow testified about the memo, "These are my words," and, "I had no direct contact with anybody from the Attorney General's office about this." Before he sent the memo, he did not discuss what should appear in the memo. He made the decision to capitalize the word, "MUST."
- 76. Renfrow's intent in sending the email was to notify appointing authorities and wardens that if a person's name was on the list and was being considered to be reappointed or moved back to a previous position, "they must drop their case against us."
- 77. It was the expectation of the entire executive management team that the Attorney General's Office would handle all settlements of employees' pending appeals.
- 78. As of the date of hearing, no one at DOC had retracted the policy set forth in Renfrow's August 15 email. SaBell was aware of it and had taken no action to have it rescinded.
- 79. Wardens had questions requesting clarification about the memo, which they raised with Atherton and Smith. Atherton and Smith raised those questions with Renfrow; however, he has not issued any further information clarifying the memo.
- 80. In addition to the legal ramifications of the memo,⁶ the memo had predictable practical effects. Any appointing authority seeking to fill a vacant position would have to face a delay in order to secure settlement of an appeal, in the event he or she sought to use an employee who had filed an appeal. Therefore, it was fastest and easiest to simply hire an individual who had not filed an appeal.
- 81. The memo also evinced DOC's institutional attitude towards employees who had filed

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⁶ Addressed in the Discussion section.

- appeals: they were different, and it was mandated that they be treated differently.
- 82. In late August 2003, Complainant found a copy of the Renfrow memo on his desk when he arrived at work. He read it and immediately felt sick to his stomach. He believed that his worst fears had been realized. When he had filed his appeal with the Board, he had requested as relief that he be held harmless by DOC and that the agency not retaliate against him for filing the appeal. Now he was faced with the fact that he would indeed pay a price for having filed the appeal, that in fact it was DOC official policy to treat him differently because he had filed an appeal.
- 83. Complainant feared he would not be able to remain in his "saved" position.
- 84. To this day, Complainant believes that his career advancement at DOC has been and will continue to be hampered by the fact he appealed his layoff. He believes he has been blacklisted. He believes that he has been passed over for two promotions because he filed an appeal.
- 85. Warden Abbott made a point of asking Complainant about the status of his appeal on a somewhat regular basis. Complainant informed him several times that he was considering dropping the appeal but was unsure of the status of his action.

Position for which Complainant was Passed Over

- 86. In late 2004, a vacant CO V Programs Manager position at Territorial was funded. By November 2004 the position was vacant and open. It was, in fact, the very position Complainant had been functioning in since August 2003.
- 87. Complainant had thrived in the position. He had received "Commendable" performance ratings. His evaluation had noted, "Captain Teigen was presented with huge challenges in this past year. His previous job was abolished with the budget shortfall and he was in limbo for quite awhile. He faced this challenge with courage, determination and a dedication to the department. He remained positive and willing to be flexible throughout the entire situation. We have definitely benefited by being able to keep Captain Teigen here at CTCF and utilize his expertise."
- 88. The evaluation further stated, "Captain Teigen was reassigned into this area when the Department had to abolish so many positions this past fiscal year. This is a new area to him and he has put forth quite a bit of effort in an ability to learn his new responsibilities. He has done an excellent job in beginning to get accountability in areas which have suffered for years. He has addressed the issues head on and has produced excellent results." The evaluation continues in this vein.
- 89. Complainant had tested for the position previously and was one of the top three individuals on the eligibility list for it.
- 90. Warden Abbot had the authority to hire Complainant off the list. He did not do so.

- 91. Warden Abbott hired another individual from a different list.
- 92. The only plausible explanation for DOC's failure to hire Complainant for that position is the fact it was a highly desirable position not to be given to Teigen because he had filed an appeal of his layoff.
- 93. Warden Abbott was in Teigen's corner. However, Renfrow and the other executive management team members gave Abbott his marching orders. Abbott was either specifically told by DOC managers above him in the chain of command not to hire Teigen, or, he knew that he would pay too high a political price to hire Teigen into a CO V position. The August 15 memo has created an atmosphere that emasculates wardens' ability to operate independently and effectively in making hiring decisions.
- 94. In November 2004, Complainant, believing his career at Territorial was at an end, and seeking to return to his desired career track, requested a transfer to an open CM III position at another prison facility. Warden Abbott approved the transfer. Complainant has served in that post since November 2004.
- 95. Complainant requests the Board to order DOC to overturn the erroneous abolishment of his CM III position, to return him to a CM III position retroactive to May 2003 (for purposes of service credit for potential future promotions), and for an order rescinding the August 15, 2003 Renfrow memo.

DISCUSSION

A. Burden of Proof

In this *de novo* proceeding, Complainant has the burden to prove that the abolishment of his position and denial of retention rights were arbitrary, capricious, or contrary to rule or law. The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

B. Respondent abolished Complainant's position in violation of the layoff statute and Board rules governing layoffs

Respondent violated the layoff statute and Board layoff rules by failing to consider seniority in total state service in abolishing Complainant's CM III position prior to that of Ms. McGowan. Section 24-50-124, C.R.S. Complainant and Ms. McGowan were both certified in the CM III class. Complainant's time band was more senior than McGowan's. Respondent violated State Personnel Board Rules R-7-9 by failing to use time bands to first determine seniority of all CM III's; Respondent then violated Rule R-7-14 by failing to displace McGowan, in the most junior time band, before displacing Complainant.

The layoff rules, on their face, apply to both abolishment of positions and to the calculation of retention rights after layoff notices have been issued. Chapter 7, Board Rules. See

also, Halverstadt v. DOC, 911 P.2d 654 (Colo.App. 1998) ("retention rights" has dual meaning in the layoff process and relates both to the right to keep a position during a RIF and also the right to bump into a position after one's own position has been abolished).

Respondent's argument that it never abolished Complainant's CM III position is rejected. Respondent has consistently referred to Complainant's CO IV job as a "saved" position. Had Respondent never abolished Complainant's CM III position in May 2003, it would never have had to "save" it. Only an abolished position need be saved. A position untouched by the RIF, such as McGowan's, was untouched by the elaborate "saving" process.

Respondent argues that Board Rule R-1-6 permitted it to force Complainant to move from one class of position to a different class. However, the rule does not so empower appointing authorities. It states,

"Appointing authority powers include, but are not limited to: hiring and evaluating performance; determining the amount and type of any performance award; <u>defining a job</u>; administering corrective/disciplinary action; determining work hours and safe conditions and tool of employment; identifying and administering layoffs; and, accountability for any other responsibilities in rule and procedure." (Emphasis added.)

Rule R-1-6 gives appointing authorities discretion to assign specific duties to an employee within the class to which the employee has been certified. To reassign an employee from one position to a different position in a different class is a transfer. Section 24-50-112.5(5), C.R.S.

Respondent's mass transfer of the thirty abolished positions from other class series into the Custody and Control class series was a reorganization under the RIF statute. It was a change in the fundamental structure, positions, and functions of the thirty positions. As a reorganization, this action was required to be posted as a business plan, for all affected employees to view.

Board Rule R-7-7(A) provides:

"Reorganization means a change in the fundamental structure, positions, and/or functions accountable to one or more appointing authorities. The department shall post a business plan documenting the reorganization in a conspicuous place before issuing the first layoff notice. This plan must include an organizational chart, the reasons for the change, the anticipated benefits and results, and a general description of the expected changes and their effects on employee[s]." State Personnel Board Rule R-7-7(A), 4 CCR 801.

There are important policies underlying this rule requiring agencies to post reorganization plans. Paramount is the pre-planning this process encourages. But equally important is the requirement that agencies operate in the sunshine. To allow an agency to implement a significant reorganization without publishing its' purposes and overall plans is inherently arbitrary and capricious, and invites abuse of the type seen in this case. Without a reorganization plan, high-level managers such as Renfrow are free to pick up the telephone and order the Human Resources office to run roughshod over the retention rights process for two GP V

positions. Respondent violated Board Rule R-7-7(A) by failing to post a reorganization plan after determining to move thirty positions into Custody and Control.

C. Respondent denied Complainant Retention Rights in violation of the Layoff Statute and Board Rules Governing Layoffs

Respondent abolished Complainant's CM III position based on lack of funds and due to reorganization. The layoff statute provides Complainant with mandatory retention rights. It states, "Such employees [subject to a RIF] shall have retention rights throughout the principal department in which they are employed. . . ." Section 24-50-124, C.R.S.; Board Rule R-7-18 ("The department shall offer retention rights in the following priority")

Respondent violated Complainant's statutory retention rights by refusing to allow him to exercise them. On July 7, Warden Abbott informed Complainant that he would not be permitted to remain in his CM III job; that position had been abolished and he was, pursuant to the reorganization, forced to take a transfer into the CO IV position, in a different class. Complainant immediately and appropriately requested retention rights to McGowan's CM III position. HR staffer Thompkins responded that he would receive them. Then, discussions ensued after which Renfrow and SaBell determined, incorrectly, that the affected employees would be denied retention rights.

D. DOC Retaliated Against Complainant for Filing an Appeal of his Layoff

Respondent argues that its actions herein constitute harmless error. This argument is rejected on several grounds.

Renfrow's August 15, 2003 memo casts all of the facts of this case in a conspiratorial light. The memo represents DOC employees' worst fears: if they file an appeal they will be retaliated against through denial of reemployment rights, denial of retention rights, and denial of substantive rights under the State Personnel Systems Act. In essence, they will be targeted by DOC management for disparate treatment.

The August 15 memo, when combined with Renfrow's manipulation of the retention rights process, reveals an institutional hostility to the state personnel system and to any employee that avails him or herself of the rights accorded under that system. The memo is retaliatory on its face, is a violation of this state's public policy of assuring classified employees the right to State Personnel Board oversight of agency employment actions, and constitutes an arbitrary and capricious abuse of authority.

Colorado Constitution, article XII, section 13(1) sets forth the merit principle which is at the heart of the classified personnel system: "Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness . . ." The layoff statute mandates, "A certified employee who is separated shall be placed on a department reemployment list for a period of not less than one year." Section 24-50-124(2), C.R.S. Rule R-4-2 provides, "Selection is based on quality of performance and job-related

ability" Rules R-4-8 and R-9 state that reappointment and reinstatement are "discretionary appointments."

The August 15 memo removes appointing authority discretion over reappointments and reinstatements by imposing arbitrary and illegal consideration of a non-merit related factor on the appointment process: whether an individual has exercised his or her right to appeal. The mandate is a facial violation of the merit principle in our state constitution. Further, it constitutes arbitrary and capricious agency retaliation against employees who have exercised statutory appeal rights that are the foundation of the personnel system.

The policy of the memo is to deny DOC employees the right to grieve or appeal its employment actions. To coerce an employee (or former employee) into waiving legal rights provided in the State Personnel Systems Act as a condition of employment is contrary to law and repugnant to the state personnel system. *See*, Colo. Const. Art. XII, Section 13; Section 24-50-101, *et seq.*, C.R.S. The essence of the right to appeal is an assurance that the employee will enjoy an unbiased adjudication of issues in an objective tribunal. Here, DOC has nullified that right in an official act of agency-wide policy.

This type of agency action erodes confidence in the entire classified system. Employee confidence in the integrity of the classified system is essential to maintenance of a high quality workforce. Public confidence in the classified system is critical to attracting a high caliber candidate pool of applicants for state employment.

Turning to the importance of retention rights specifically, most employees entering the classified system do so with a specific career track in mind. In addition, historically, such individuals have expected to be rewarded for longevity in the system. The retention rights process rewards length of service by empowering the more senior employees to remain on that chosen career track. To allow an agency to make an end run around the retention rights process, as has occurred herein, sends a signal to long-term employees that their loyalty, expertise, and length of service will not be rewarded.

Complainant proved that he was passed over for the CO V position at Territorial because he filed this appeal. He never appealed that decision, but instead, transferred to a CM III in a different facility in November 2004. Therefore, no remedy in connection with that CO V position can be given herein. However, this finding of retaliation is relevant to the general discussion herein and the application of the attorney fee statute below.

E. Respondent's Action was Arbitrary and Capricious

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must

reach contrary conclusions. Lawley v. Department of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001).

Board Rule R-1-8 states,

"All appointing authorities, managers, and supervisors are accountable for compliance with these rules and procedures and state and federal law, and for reasonable business decisions, including implementation of other policy directives or executive orders."

The managers involved in implementing the layoff statute and rules at DOC failed to hold themselves accountable for compliance with the layoff rules and regulations.

Respondent disregarded the law governing layoffs in abolishing Complainant's position. DOC neglected or refused to review and apply the layoff rules mandating use of time bands and application of seniority in state service to the layoff process. At hearing, it provided no basis for this gross oversight. Its action in abolishing Complainant's position was such that no reasonable agency manager in charge of an RIF would have failed to engage in this simple process.

Respondent argued that it never abolished Complainant's position; therefore, it was not required to honor his request to exercise his retention rights. This entire line of argument is premised on the fact that it placed Complainant in a "saved" job, in an entirely different class. Respondent somehow fails to recognize that had it not abolished Complainant's CM III position in the first place, it would not thereafter have had to find him a "saved" job.

Respondent's decision to move thirty positions into an entirely new classification constituted a reorganization under the layoff rules; therefore, DOC was required to post a reorganization plan for all affected employees, and to give the employees whose positions were abolished in that reorganization process retention rights. Respondent's argument that the mass movement of these positions to an entirely different class series, under a different funding line item, was nothing more than "defining a job" rings hollow. DOC sought to avoid having to undertake the work of processing retention rights, and therefore simply sent email edicts denying employees those rights. That act was arbitrary and capricious.

F. An Award of Attorney Fees and Costs to Complainant is Mandated

Section 24-50-125.5, C.R.S. states,

"Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action **shall be liable** for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ." (Emphasis added.)

Respondent's abolishment of Complainant's position was groundless. A personnel action is groundless if a party "fails to offer or produce any competent evidence to support such an action or defense." Board Rule R-8-38(A), 4 CCR 801. Respondent failed to offer or produce any competent evidence to support its decision to eliminate Complainant's CM III position prior to eliminating McGowan's. There is no explanation in the record as to why DOC bypassed the layoff statute and Board rules clearly mandating the use of time bands and seniority in state service in implementing a RIF. The May 2003 elimination of Teigen's position was the triggering event for all that followed; had that not occurred, Complainant's position would never have had to be "saved" and he would never have been forced into the CO IV position.

The evidence in this case illustrates a pattern of institutional hostility to the state personnel system and to employees who file appeals within that system. Respondent's aversion to the personnel system resulted in its flagrant violation of the layoff rules. That violation was made in bad faith. See *Mayberry v. Univ. of Colo. Health Sciences Center*, 737 P.2d 427, 430 (Colo.App. 1987). After ignoring seniority in state service in implementing the layoff in May 2003, DOC then issued a directive forcing appointing authorities to punish those employees who challenged that illegal activity. This agency's attitude towards the retention rights process is best reflected Renfrow's calls to save the two GP V positions from being bumped. One is left with the impression that at DOC, the retention rights process was arbitrarily determined by the directives of the top managers.

Warden Abbott clearly did his best to advocate for Complainant, within the confines of the August 15 memo and the political atmosphere in which he works. Unfortunately, the inevitable outcome of Respondent's institutional hostility towards the personnel system is to actually harm individual employees such as Complainant, who have families settled in specific communities, health conditions to consider, and career paths chosen.

In view of DOC's official policy of retaliating against employees who have filed appeals with the State Personnel Board, an award of attorney fees and costs is essential here. Without an attorney fee award, Respondent's policy of coercion and retaliation will have prevailed: Complainant will have been punished for appealing his illegal layoff in the form of incurring significant attorney fees. *Mau v. E.P.H. Corp.*, 638 P.2d 777, 781 (Colo. 1982).

The attorney fee provision of the State Personnel Systems Act serves the critical purpose of encouraging employees to appeal personnel actions taken in bad faith and in willful violation of clearly established legal principles, as has occurred herein. To deny Complainant an award of attorney fees will punish him for bringing this action, and hence, will deny him the make-whole relief to which he is entitled. *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo.App. 1987); *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984.

CONCLUSIONS OF LAW

- 1. Respondent's action was arbitrary, capricious, and contrary to rule and law.
- 2. Complainant is entitled to an award of attorney fees and costs.

ORDER

Complainant is reinstated to the CM III position retroactive to May 2003; Respondent is to pay Complainant's attorney fees and costs incurred in this actions; Respondent is to rescind the August 15, 2003 memorandum issued by Mr. Renfrow discussed herein; Respondent is ordered to refrain from retaliating against Complainant for filing this appeal.

Dated this 31st day of January, 2005, at Denver, Colorado.

Mary S. McClatchey Administrative Law Judge 1120 Lincoln Street, Suite 1420 Denver, CO 80203 (303) 764-1472

CERTIFICATE OF MAILING

This is to certify that on the day of February 2005, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS in the United States mail, postage prepaid, addressed as follows:
William S. Finger Mark Gerganoff Frank & Finger, P.C. 29025-D Upper Bear Creek Road P.O. Box 1477 Evergreen, CO 80437-1477
and in the interagency mail to:
John August Lizza Melanie Sedlak Assistant Attorneys General Employment Section 1525 Sherman Street, 5 th Floor Denver, Colorado 80203

Andrea C. Woods